

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

76-7476

TO BE ARGUED BY
LEON BAER BORSTEIN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,

-against-

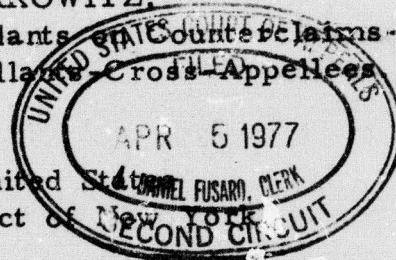
CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

-and-

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ.

Additional Defendants on Counterclaims-
Appellant-Cross-Appellees



Appeal from a Judgment of the United States District Court for the Southern District of New York

REPLY BRIEF OF APPELLANT-CROSS APPELLEE ROBERT MUH

LEON B. BORSTEIN
Attorney for Additional Defendant on Counterclaims-
Appellant-Cross-Appellee Robert Muh
350 Madison Avenue - New York, New York 10017

(212) 682-2233

(6245-1)

TABLE OF CONTENTS

	<u>Page</u>
A. Nature of Reply Brief.....	1
B. Additional Facts.....	3
C. Argument	
Judge Gwen's Opinion did not hold the Appellant MUH liable on the theory of breach of fiduciary duty but rather on the theory of conversion.....	5
D. Conclusion.....	11

A.

NATURE OF REPLY BRIEF

Appellant MUH was found liable by Judge Owen for the "wrongful conversion" (P 536*) of Blei and Donoghue's capital contribution of \$76,868.75 each and for the "wrongful conversion" (P 535-6) of Gross' capital of \$337,921. MUH was not held liable for the conversion of Gross' "in kind" securities nor for the punitive damages.

MUH's Brief on Appeal analyses in some detail the theory of liability upon which Judge Owen awarded to Gross damages of \$337,921 on account of the loss of his capital in the Partnership. That analysis showed that Judge Owen's opinion was not clear as to the theory upon which he was relying. However, various facially viable theories were discussed as inapplicable. MUH's main argument was that the conversion theory was the theory upon which Judge Owen relied, but that it too was inapplicable in the case of Gross.

Appellee Gross has responded to MUH's arguments two ways. Firstly he ignored MUH's arguments and attempted to subordinate them to those of Finley Kumble and Kayne.

* Notations such as (P 101) & 101) and (A 101) refer to the referenced pages in the Pleadings, Exhibits and Trial Transcript of the Appendix respectively.

Gross' brief stated at Page 46 that the "leading briefs" of Appellants did not discuss "breach of fiduciary duty" as a viable theory of liability. Gross' brief then begins its argument on Page 57 thereof never once mentioning MUH's arguments. Secondly, Gross framed his issues and made argument as if the lower court assessed damages on the theory of breach of fiduciary duty without ever addressing itself to the conversion argument. Although one might assume thereby, that Gross has conceded that conversion as a theory of liability will not support the court's award of damages to him, more realistically, we assume that Gross has reserved this counter argument for his Reply Brief. MUH unfortunately will be unable to respond thereto until oral argument.

Therefore, because further legal argument on the theory of conversion is not yet appropriate, this Reply Brief will speak to the issue of breach of fiduciary duty raised by Gross' brief.

The Gross Brief on Appeal similarly failed to respond to MUH's second argument that he should not be held personally liable to Bleich and Donoghue. That argument pointed out that there was not even a scintilla of proof that MUH knew

he was violating a duty owed to the women. Therefore, as a supposed aider and abettor of a tort, he could not be held liable.

Again MUH advises the Court that pursuant to F.R.A.P. 28, he adopts by reference those arguments where applicable as if fully set forth herein.

B. ADDITIONAL FACTS

Although it is not highly relevant to the issues presented herein, certain gross misstatements of fact in Appellees Brief are hereinafter clarified. Left unanswered these errors might color the court's objective appraisal of the legal arguments presented by MUH.

On Page 9 of Appellees' brief it states that Risher and MUH were brought into Newburger Loeb by Kayne but fails to inform the court that Gross was still the managing partner at the time.

In at least four places (Pages 14, 45, 82 and 88) Gross' Brief hammers away at the fact that MUH and Kayne sold their securities in Newburger Loeb & Co., Inc. for \$400,000 each. What he neglected to mention is that the sale was made to co-appellant Risher, that MUH gave up his \$35,000 yearly salary, that the buyers eventually paid MUH \$100,000 in the sale over several years not \$400,000

and that the sale effected no diminution of the shareholders' equity in the corporation. More importantly MUH does not concede nor admit that his profit on the sale of his stock has the least bit to do with the issues herein.

One quasi-factual quasi-legal point bears mention. This entire case has been suffused with the highly volatile charge that there was a fraudulent forgiveness of debt by the new team running in favor of the general partners. That finding by the lower court overlooks a significant fact. What really occurred was that the corporation actually acquired less than 100% of the General Partner's deficits in the partnership. Approximately 75% was acquired. However, and this is a big however, that portion not acquired by the corporation is still an asset of the partnership. Since Gross did not contract away his rights to these moneys he still has a valid cause of action* against the old general partners to force them to pay-in their "forgiven" or deficit capital to the partnership.

Lastly, MUH's overall participation in the alleged wrongful acts was extremely limited. MUH had nothing to do with the Buckley claim; he was held not liable for the conversion of Gross' in kind securities; he is totally blameless on the Kayne and Sloane v. Gross arbitration; and the lower court found that he had nothing to do with Persky's opinion letter. In fact MUH's participation in

*Subject to a question of the Statute of Limitations.

the alleged wrong doings was so minimal that when Judge Owen queried Mr. Mandell about Messrs. Aixala, Berkowitz and MUH, Mr. Mandell lamely putting forth his best case against MUH stating that MUH had been one of the officers running Newburger Loeb; that he made a lot of money on the sale of his stock; and was at the closing when Burak declined to give an opinion. Aixala and Berkowitz were later dismissed.

C. ARGUMENT

Judge Owens' Opinion did not hold the Appellant MUH liable on the theory of breach of fiduciary duty but rather on the theory of conversion.

MUH's thesis is simple: The transfer on February 11, 1971 was not wrongful as to Gross neither as a wrongful conversion of Gross' assets nor as a breach of some fiduciary duty. Gross' attempt to view the transfer as a step in a larger overall tort must fail for the same reasons that the prima facie tort theory failed. In the MUH Brief on Appeal it was demonstrated how the simultaneous allegations of "conversion" and "prima facie tort" invariably resulted in the dismissal of the prima facie tort claim. The argument ran that once a recognizable tort was alleged the other becomes irrelevant.

The same analysis obtains to the simultaneous claims of "conversion" and "breach of fiduciary duty." Let us begin by looking at Judge Ward's early opinion on the pre-trial motions to dismiss.

Judge Ward found the execution of the Transfer Agreement to be wrongful. He then stated:

In view of this determination that the Transfer Agreement violated N.Y. Partnership Law §98 (McKinney 1948), the Court need not decide if the making of the Agreement breached a fiduciary duty owed by the consenting partners to Gross, Bleich, and Donoghue. (P 455-6)

In our opinion Judge Ward was saying that the Transfer Agreement was wrongful because it violated §98 of the Partnership Law. The Transfer then was a tortious conversion because there had been a statutory duty to refrain from the transfer. He was also saying, we believe, that the breach of that duty was a recognizable tort, conversion, making irrelevant a further finding that the said duty was also a fiduciary duty. Other than the specific duty under Section 98, Judge Ward would have found no breach of the duty, fiduciary or otherwise. He was also saying that once the conversion was shown, the charge of breach of fiduciary duty became irrelevant.

Judge Owen picked up somewhat on this when he opened his opinion by stating his understanding of the claim:

"The essential allegations of the Gross... claims are that the partners wrongfully transferred the assets of the Partnership...and that the partners, the said promoters, and Finley, Kumble...entered into a conspiracy...to...injure Gross...in their property in connection with the said transfer of assets...(P 510)

Judge Owen then goes on to state (P 514) that the First Counterclaim alleged "that the transfer...was in violation of §98 of the Partnership Law..." The Second and Fourth Counterclaims, which claimed liability based on breach of fiduciary duty, are never discussed by Judge Owen.

On Page 19 of his opinion (P 526) Judge Owen makes his findings as follows:

...the partners...lent themselves to the goals of this conspiracy by affirmatively permitting the Partnership to transfer its assets to the Corporation in violation of Section 98 of the Partnership Law and in violation of their fiduciary duties to Gross, Bleich and Donoghue as other partners, and by their knowing acquiescence in the use by the new team of the various baseless litigation threats against Gross. (P 526)*

Thereafter, Judge Owen never again mentions any "fiduciary duty" nor "breach of fiduciary duty" but rather speaks consistently of the tort of "conversion" the duty

* If there was a finding of breach of fiduciary duty, Judge Owen seems to be confining it to the partners only. MUH was never a partner.

under §98 of the Partnership Law and the Appellant's liability because of this conversion. At P 529, he stated --

Turning to the question of damages, the various groups of participants must be treated separately. This is because there are basically three areas of damage with different participants in each. Those areas are (1) the conversion of the capital of Gross, Bleich and Donoghue, (2) the conversion of Gross' "in kind" securities, and (3) punitive damages. (Emphasis supplied)

At P 531 he stated --

...by causing the transfer to take place in knowing violation of Section 98, the members of the new team are individually liable for this damage. (Emphasis supplied)

P 532 he stated --

The members of the new team, by conspiring to effect the transfer of the assets to their new corporation to the damage of Gross, Bleich and Donoghue are also liable individually for the conversion damages specified. (Emphasis supplied)

At Ps. 535 and 536 he stated --

In sum, I find (1) in favor of defendant Gross and against plaintiff and each of the additional defendants on counterclaims (except Berkowitz) on the first, second and fourth counterclaims in the sum of \$337,921.00 plus interest since February 11, 1971 by reason of the wrongful conversion of his capital... (Emphasis supplied)

The Court clearly assesses damages to Gross because of the wrongful "conversion" of his assets in violation of § 98.

Even Gross' counsel recognized that his true cause of action, if any, was in conversion. He forcefully argued to the lower court as follows:

In this particular case, I would like to start first with the violation of Section 98, and that's the wrong way to put it because it is not that it is a violation of Section 98, it is that an unauthorized and improper transfer was made of the assets which amounts to a conversion.

Some of my friends argue that only the partners can be liable for violating Section 98, and our position is there is no substance to that. The fact is, Section 98 delineates the power and the authority to transfer partnership assets, and a transfer without power and without authority is a conversion.

A conversion is a tort. Everybody who participates in the tort is liable for the tort jointly and severally, and that is the Section 98 situation, for starters. (A2677, 78)

Gross' main argument now seems to be that the conversion of the capital contribution of Gross by the transfer was in reality only one step in a series of steps in carrying out one overall conspiracy to breach the partners' fiduciary duty to Gross and others. (Gross Brief 53) On the one hand this argument tacitly admits the weakness of the tortious conversion theory as applied to Gross' capital contribution, and on the other it flies in the

face of Judge Owen's findings. Judge Owen stated clearly in his opinion (P 529) that "there are basically three areas of damage with different participants in each. These areas are (1) the conversion of the capital of Gross, Bleich and Donoghue, (2) the conversion of Gross' "in kind" securities, and (3) punitive damages." (Emphasis supplied) The punitive damages award in reality amounted to an award to Gross etc. for the bad faith breach of fiduciary duty that Gross complained of. But the other two awards were really awards based on the tort theory of "conversion." Even as to the punitive damages, the court did not hold MUH liable. If anything, therefore, MUH was not held to have breached any fiduciary duty owing to Gross. It is patently clear that where the court has found there to be "different participants" in the various tortious acts, there cannot be one overall conspiracy.

Ultimately, it matters little what one calls the tort. The question to be answered is -- Did the Transfer violate any duty owing to Gross by virtue of § 98 of the N.Y. Partnership Law. If this Court finds such a duty running to Gross as did the lower court, then its irrelevant whether the breach of that duty is called a conversion or a breach of fiduciary duty. What Gross' Brief has abysmally failed

to do, is counter MUH's argument and analysis showing that MUH and the others had no duty to Gross to refrain from effecting the Transfer on February 11, 1971. If this court is persuaded by that argument then the judgment as to the conversion of Gross' capital contribution should be reversed.

CONCLUSION

We respectfully pray that this Court modify the judgment below by striking MUH's name from Paragraph 2(a) thereof.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

ROBERT LA GRASSA , being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60th Rd.
MASPETH, NYC

That on the 5th day of APRIL , 1977 ,
deponent personally served the within REPLY BRIEF OF ADDITIONAL
DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE ROBERT MUH
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving true copies of same with a duly
authorized person at their designated office.

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants-Appellees-
Cross-Appellants, Gross, Bleich,
Gross & Co. and Donoghue
10 East 40th Street
New York, N. Y. 10016

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Additional Defendants on
Counterclaims-Appellant-Cross-Appellee,
Finley, Kumble, Wagner, Heine, Underberg &
Grutman
345 Park Ave.
New York, N. Y. 10022

(SEE FOLLOWING PAGE FOR ADDITIONAL NAMES)

Robert La Grassa

Sworn to before me this

5th day of APRIL 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

